ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
BRIAN S. MILLER, JUDGE

DIVISION I

CACR06-1240

June 27, 2007

JAMES NOWLIN APPELLANT	AN APPEAL FROM THE LAFAYETTE COUNTY CIRCUIT COURT
v.	[CR-04-40-1]
STATE OF ARKANSAS APPELLEE	HONORABLE JOE EDWARD GRIFFIN, JUDGE
	AFFIRMED

A jury found appellant James Nowlin guilty of criminal attempted theft of property with a value over $500 and less than $2500 and of breaking or entering and sentenced him to a total of twelve years in the Arkansas Department of Correction. On appeal, Nowlin challenges the sufficiency of the evidence supporting his convictions and asserts that the trial court erred in admitting evidence of his prior convictions. We affirm.

Background

Jimmy Brackman is the owner of a farm located about ten miles west of Bradley along Highway 160 in Lafayette County. While driving home on the night of June 9, 2004, Brackman noticed that one of the doors to his shop was open. After stopping to investigate, he realized that someone was inside the shop, so he asked his wife, via cellular phone, to call

his neighbors for assistance. When two of Brackman's neighbors arrived, they further investigated and noticed that several pieces of equipment had been placed near the front door. When the three men heard someone exiting the shop's south-side door, they called the sheriff's department and went outside and waited. While waiting for the sheriff, Brackman and his neighbors observed a pickup truck parked across the highway between two corn fields.

Deputy Pete Richardson arrived soon thereafter and went to investigate the pickup. He found Nowlin sitting in the pickup with damp and muddy clothes. Nowlin told Deputy Richardson that he was taking a nap; however, Deputy Richardson suspected that Nowlin was involved in the break-in at Brackman's shop, and took Nowlin into custody and turned him over to Deputy Theardis Early. When Deputy Richardson went back to the shop, he found footprints leaving the south-side of the shop and tracking back to the driver's side of Nowlin's truck.

Nowlin was charged with criminal attempt of theft of property valued over $500 but less than $2500 and with breaking or entering. Prior to the trial, Nowlin moved in limine to preclude the State from introducing his prior criminal history, which included guilty pleas in 1985 and 2003 for burglary and theft of property and three misdemeanor convictions for criminal trespass, criminal mischief, and night hunting. The trial court granted Nowlin's motion in limine.

At the trial, several witnesses established that: the ground and fields were wet on June 9, 2004, because it had rained; at the time Nowlin was located in his truck, his shoes were caked with fresh mud, the front of his clothes was wet, and he had green vegetable matter

from the corn fields on his shirt and pants. Deputy Early testified that Nowlin's shoe prints matched prints found at the shop. Deputy Richardson testified that the tire tread on Nowlin's truck was dry and the engine hood was cool. Brackman valued the items placed near the shop door at between $1220 and $1325.

Nowlin testified that he spent the day working outside on a friend's truck and that he decided to drive home when it started to rain. He drove around before going home, but he got sleepy, so he pulled off the road for a nap. He explained that the grass and mud on his clothes and shoes were from working outside on his friend's truck. He said that the back of his clothes was dry because his truck seat had absorbed the moisture from his backside. Nowlin denied ever being on Brackman's property or taking anything from the property. Nowlin testified that the reason he did not park at Brackman's shop was because "[y]ou pull in a shop you're sitting in somebody's shop and then you're automatically going to be [sic] something wrong. So I'm not going to pull in there."

Upon the completion of Nowlin's direct testimony, the State asserted that his statement as to why he did not park on Brackman's property opened the door for the introduction of Nowlin's prior convictions. The trial court agreed and admitted Nowlin's prior convictions. Nowlin moved for a directed verdict at the close of the State's case and again at the close of all the evidence, alleging that the State failed to produce evidence placing him on the Brackman property. He also argued that the State failed to prove that the value of the property was in excess of $500. The trial court denied the motions and found Nowlin guilty on both charges. He was sentenced to two consecutive six-year sentences in the

Arkansas Department of Correction.

Sufficiency of the Evidence

On appeal, Nowlin first argues that the trial court erred in denying his motion for directed verdict. A motion for directed verdict is treated as a challenge to the sufficiency of the evidence. *Geer v. State*, 75 Ark. App. 147, 55 S.W.3d 312 (2001). In reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the State and consider only the evidence that supports the verdict. *Stewart v. State*, 88 Ark. App. 110, 195 S.W.3d 385 (2004). We will affirm a conviction if substantial evidence exists to support it. *See Harper v. State*, 359 Ark. 142, 194 S.W.3d 730 (2004). The test for determining the sufficiency of the evidence is whether substantial evidence supports the verdict. *Aydelotte v. State*, 85 Ark. App. 67, 146 S.W.3d 392 (2004). Substantial evidence is evidence forceful enough to compel the fact-finder to make a conclusion one way or the other without resorting to speculation or conjecture. *Eagle v. State*, 92 Ark. App. 328, 213 S.W.3d 661 (2005). We view the evidence in the light most favorable to the State, considering only the evidence supporting the verdict. *Brock v. State*, 90 Ark. App. 164, 204 S.W.3d 562 (2005). We do not weigh the evidence presented at trial or assess the credibility of witnesses, as these are matters for the finder of fact. *Id.*

A person commits the offense of breaking or entering if for the purposes of committing a theft or felony he breaks or enters into any building, structure, or vehicle. Ark. Code Ann. § 5-39-202(a)(1) (Repl. 2006). Nowlin argues that there was no direct testimony placing him on the Brackman property or in the shop. Circumstantial evidence may provide a basis for

a conviction if it is consistent with the defendant's guilt and inconsistent with any other reasonable conclusion. *Tillman v. State*, 364 Ark. 143, 217 S.W.3d 773 (2005). The jury must decide whether circumstantial evidence excludes every other reasonable hypothesis consistent with innocence. *Lowry v. State*, 364 Ark. 6, 216 S.W.3d 101 (2005).

The circumstantial evidence placing Nowlin in Brackman's shop is compelling. Although Nowlin attempted to explain away the testimony of the other witnesses, the jury had the duty of assessing the credibility of trial witnesses and was entitled to disbelieve the testimony of the accused. *Winston v. State*, 368 Ark. 105, ___ S.W.3d ___ (2006). The jury apparently did not believe Nowlin's version of events. Therefore, when the evidence is viewed in a light most favorable to the State, we cannot say that the jury resorted to speculation and conjecture in finding Nowlin guilty of breaking or entering.

Value of the Property

Nowlin's second argument is that the State failed to prove that the property had a value of $500 because the State relied solely on the testimony of Brackman. He further argues that Brackman's testimony is insufficient because he only testified as to the items' approximate worth and not their replacement value.

Brackman's undisputed testimony is sufficient to establish the value of his property. *See Sullivan v. State*, 32 Ark. App. 124, 798 S.W.2d 110 (1990)(holding that a crime victim's undisputed testimony is sufficient to establish the value of his property). "Value" is defined as the market value of the property at the time and place of the offense, or if the market value of the property cannot be ascertained, the cost of replacing the property within a reasonable

time after the offense. Ark. Code Ann. § 5-36-101(12)(A)(i) (Repl. 2006). The preferred method of establishing value is by expert testimony; however, value may be established by circumstances clearly showing a value in excess of the statutory requirement. *Wright v. State*, 80 Ark. App. 114, 91 S.W.3d 553 (2002).

Nowlin did not object to Brackman's testimony that his 10,000 pound wench had a replacement value of approximately $800 or that Brackman had recently paid $1000 for the stereo that was ripped from his wife's vehicle. Nowlin also did not dispute that Brackman's fair roller leads had a replacement value of $150 to $200 or that Brackman's tool kit had a "fair market value" of $70 to $75.

Admissibility of Prior Convictions

Nowlin's final argument is that the trial court erred in admitting his prior convictions into evidence.[1] When Nowlin concluded his direct testimony, the State argued that the prior convictions should be admitted because Nowlin opened the door. At that point, the following transpired:

DEFENSE COUNSEL: Your honor, I would still object. I think what [the State] is getting at is the fact that he was just out riding around and this goes back to the criminal trespass and night hunting. All of those charges are misdemeanors, [your] honor, and I would make again a 403 argument that this is highly more prejudicial than it is probative to mention three 2003 convictions that deal with basically.

THE STATE: No, these are 2005, after this happened. These are, he has been convicted of criminal mischief and night hunting, and a criminal

[1]We note that Nowlin did not make a 404(b) objection in the trial court and does not make a 404(b) argument on appeal. We therefore express no opinion on a 404(b) argument.

trespassing on other people's property.

. . . .

DEFENSE COUNSEL: So that's my argument, your honor. That this was prior to this matter and it is highly, I mean we are talking about three misdemeanors that basically stem from around night hunting, is what it is. And this case —

THE STATE: No, they broke a bunch of gates down and went on people's property and did about $2800.00 worth of damages.

DEFENSE COUNSEL: Still, your honor, I think it is, again my objection is that 403, that it is more prejudicial than probative and that they are misdemeanors.

. . . .

THE STATE: I mean, where we are going to start at is, you know, why would he be riding around and [it's] all the time is the answer I suspect. It's not like this is one night he went out and happened to get sleepy.

DEFENSE COUNSEL: But, your honor, these were in 2003.

THE STATE: I can't prove every one of them, but I can prove one of them. That they were out all the time doing night owl kind of stuff and they don't [sic] sleepy.

DEFENSE COUNSEL: Your honor, this is 2003 that these events allegedly occurred and this incident occurred in June of 2004. I think the proximity not a course of conduct [sic]. I understand, I don't think [the State] is making that argument, but it is not a course of conduct. And I would also make the argument that it's proximity in time to this event would again make it more prejudicial than probative.

Despite Nowlin's objections, the trial court permitted the State to question him about his prior criminal history.

On appeal, Nowlin argues that his prior convictions were inadmissible under Rule 403 of the Arkansas Rules of Evidence. He relies on *Nelson v. State*, 92 Ark. App. 275, 212 S.W.3d 31 (2005), in which this court reversed the trial court. In *Nelson*, we held that the appellant's fourteen-year-old prior drug conviction was improperly admitted, and we reversed and remanded for new trial. Our rationale for reversing was that the appellant's prior convictions were "so remote that the evidence [was] rendered significantly less probative, and the danger of unfair prejudice correspondingly [outweighed] any probative value." *Id.* at 290, 212 S.W.3d at 40. Nowlin's citation to this case, however, ignores that we were reversed by our supreme court. *See Nelson v. State*, 365 Ark. 314, ___ S.W.3d ___ (2006).

Rule 403 provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. The trial court has considerable discretion in determining whether the probative value of prior convictions outweighs their prejudicial effect, and that decision will not be reversed absent an abuse of discretion. *See Benson v. State*, 357 Ark. 43, 160 S.W.3d 341 (2004). Given our supreme court's prior rulings, when we review this case under Rule 403, we cannot say that the trial court abused its discretion.

Affirmed.

GLOVER, J., agrees.

BAKER, J., concurs.

Karen R. Baker, J., concurring. I concur with the majority's holding that the trial court's ruling did not amount to an abuse of discretion. I also agree with the majority's observation

that defense counsel's objection at trial, as well as appellant's argument on appeal, were made pursuant to Ark. R. Evid. 403. However, I write separately to note that the State's responses at trial and on appeal focus on the premise that appellant placed his credibility in issue by taking the stand. Although neither party cites either Rule 608 or Rule 609 of the Arkansas Rules of Evidence, the State's argument is more logically related to impeachment pursuant to those rules. Under the facts of this case, none of the convictions used at trial by the prosecution were admissible for impeachment purposes, particularly in view of the motion in limine that had been granted prior to trial, and their use would be improper impeachment in violation of Arkansas Rules of Evidence 608 and 609. However, because appellant argues only Rule 403 both below and on appeal, I concur.